

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

UNITED STATES OF AMERICA,)
) CR-18-00258-EJD
 PLAINTIFF,)
) SAN JOSE, CALIFORNIA
 VS.)
) JUNE 10, 2022
 RAMESH "SUNNY" BALWANI,)
) VOLUME 37
 DEFENDANT.)
) PAGES 6894 - 6928

TRANSCRIPT OF TRIAL PROCEEDINGS
BEFORE THE HONORABLE EDWARD J. DAVILA
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

FOR THE PLAINTIFF: UNITED STATES ATTORNEY'S OFFICE
BY: JOHN C. BOSTIC
JEFFREY B. SCHENK
150 ALMADEN BOULEVARD, SUITE 900
SAN JOSE, CALIFORNIA 95113

BY: ROBERT S. LEACH
KELLY VOLKAR
1301 CLAY STREET, SUITE 340S
OAKLAND, CALIFORNIA 94612

(APPEARANCES CONTINUED ON THE NEXT PAGE.)

OFFICIAL COURT REPORTERS:

IRENE L. RODRIGUEZ, CSR, RMR, CRR
CERTIFICATE NUMBER 8074
LEE-ANNE SHORTRIDGE, CSR, CRR
CERTIFICATE NUMBER 9595

PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY
TRANSCRIPT PRODUCED WITH COMPUTER

A P P E A R A N C E S: (CONT'D)

FOR DEFENDANT BALWANI: ORRICK, HERRINGTON & SUTCLIFFE LLP
BY: SACHI SCHURICHT
REESE ORNATE
THE ORRICK BUILDING
405 HOWARD STREET
SAN FRANCISCO, CALIFORNIA 94105

BY: JEFFREY COOPERSMITH
701 FIFTH AVENUE, SUITE 5600
SEATTLE, WASHINGTON 98104

BY: AMY WALSH
51 W 52ND STREET
NEW YORK, NEW YORK 10019

ALSO PRESENT:

OFFICE OF THE U.S. ATTORNEY
BY: MADDI WACHS, PARALEGAL
SARA SLATTERY, PARALEGAL

UNITED STATES POSTAL INSPECTION SERVICE
BY: CHRISTOPHER MCCOLLOM

FEDERAL BUREAU OF INVESTIGATION
BY: MARIO C. SCUSSEL

UNITED STATES FOOD & DRUG
ADMINISTRATION
BY: GEORGE SCAVDIS

1 SAN JOSE, CALIFORNIA

JUNE 10, 2022

2 P R O C E E D I N G S

3 (COURT CONVENED AT 10:07 A.M.)

4 (JURY OUT AT 10:07 A.M.)

5 THE COURT: THANK YOU. PLEASE BE SEATED.

6 WE ARE BACK ON THE RECORD IN THE BALWANI MATTER.

7 COUNSEL ARE PRESENT.

8 WE ARE GOING TO CONTINUE OUR DISCUSSION REGARDING
9 FINALIZING THE JURY INSTRUCTIONS.

10 THE JURY IS NOT PRESENT. THEY ARE IN RECESS FOR THE DAY.

11 I DON'T SEE YOUR CLIENT, MR. COOPERSMITH, MS. WALSH.

12 DO YOU --

13 MS. WALSH: YES. WE FILED A WAIVER, YOUR HONOR.

14 THE COURT: ALL RIGHT. THANK YOU.

15 AND YOU AGREE TO WAIVE HIS APPEARANCE FOR PURPOSES OF
16 TODAY'S PROCEEDING?

17 MS. WALSH: WE DO.

18 THE COURT: ALL RIGHT. THANK YOU.

19 I DID RECEIVE YESTERDAY A -- AND THANK YOU FOR YOUR WORK,
20 YOUR CONTINUED WORK ON THE INSTRUCTIONS.

21 I RECEIVED A PACKET, A DRAFT. IT WASN'T FILED ON THE
22 DOCKET. I DIDN'T ASK IT TO BE FILED ON THE DOCKET, BUT IT WAS
23 A WORKING DRAFT OF OUR WORK ON THE INSTRUCTIONS. THERE'S A
24 COUPLE OF ITEMS THAT I THINK WE SHOULD DISCUSS.

25 I HAVE A COLOR COPY HERE, AND I THINK, MS. VOLKAR, AND

10:09AM 1 MS. WALSH, THANK YOU FOR PROVIDING ME THE COLOR COPY.

10:09AM 2 MS. VOLKAR: YOU'RE WELCOME, YOUR HONOR.

10:09AM 3 THE COURT: THEY SUGGEST THE REMAINING MATTERS WE
10:09AM 4 SHOULD DISCUSS.

10:09AM 5 AND I SEE THE FIRST ONE HIGHLIGHTED HERE IS INSTRUCTION --
10:09AM 6 IS IT 16? AND I'M GOING THROUGH OUR COPY. EXCUSE ME.

10:09AM 7 LET'S -- IT'S ACTUALLY INSTRUCTION 3, ISN'T IT, ON PAGE 5?

10:09AM 8 MS. VOLKAR: YOUR HONOR, IT DEPENDS ON HOW YOU WANT
10:09AM 9 TO HANDLE THE PLACEMENT AND LOCATION OF THE ALLEGED VIOLATIONS
10:09AM 10 OF REGULATIONS AND INDUSTRY STANDARDS.

10:09AM 11 IT MAY MAKE SENSE TO TALK ABOUT THE PLACEMENT OF IT WHEN
10:09AM 12 WE'RE ALSO SUBSTANTIVELY TALKING ABOUT THE OBJECTIONS TO THE
10:09AM 13 LANGUAGE, IN WHICH CASE THE FIRST WOULD BE NUMBER 3, THE
10:09AM 14 ABSENCE OF CODEFENDANT THAT YOU REFERENCED.

10:10AM 15 THE COURT: RIGHT.

10:10AM 16 WHY DON'T WE JUST START WITH THAT, WITH NUMBER 3.

10:10AM 17 MS. WALSH: THAT'S FINE, YOUR HONOR.

10:10AM 18 THE COURT: AND THEN WE'LL JUST GO THROUGH, EXCUSE
10:10AM 19 ME, THE STACK THAT I HAVE, AND THE PACKET THAT YOU SHOULD HAVE
10:10AM 20 I SHOULD SAY.

10:10AM 21 THE CONVERSATION IS REGARDING THE LANGUAGE FOUND AT
10:10AM 22 LINE 9, AND IT APPEARS THAT THE DISCUSSION IS, SHOULD THE
10:10AM 23 SENTENCE READ, "YOU MUST BASE YOUR VERDICT SOLELY ON THE
10:10AM 24 EVIDENCE AGAINST MR. BALWANI OR INTRODUCED DURING THIS TRIAL."

10:10AM 25 THOSE ARE THE TWO OPTIONS.

1 THE COURT WAS PROPOSING THE THIRD OPTION, WHICH WAS
2 "RECEIVED IN THIS TRIAL," "ON THE EVIDENCE RECEIVED IN THIS
3 TRIAL."

4 MS. WALSH: THAT WOULD BE FINE WITH US, YOUR HONOR,
5 "RECEIVED IN THIS TRIAL."

6 MS. VOLKAR: YOUR HONOR, THE GOVERNMENT DOESN'T FEEL
7 STRONGLY ABOUT THIS INSTRUCTION.

8 THE REASON THE GOVERNMENT SUGGESTS THE LANGUAGE AGAINST
9 MR. BALWANI IS TO KEEP IT AS CLOSE TO THE INSTRUCTION GIVEN IN
10 THE HOLMES TRIAL AS NOTED IN OUR FOOTNOTE.

11 THE ONLY OTHER THING I WANTED TO NOTE, AND I DID POINT
12 THIS OUT TO MS. WALSH, BECAUSE WE ADDED THE LANGUAGE FROM MODEL
13 2.16, IF YOU READ THE SENTENCE THAT RUNS FROM 6 TO 7, IT SAYS,
14 "KEEP IN MIND, HOWEVER, THAT YOU MUST DECIDE THIS CASE SOLELY
15 ON THE EVIDENCE PRESENTED TO YOU IN THIS TRIAL."

16 AND I FELT THAT THAT MADE THIS LAST SENTENCE REDUNDANT.

17 THE COURT: RIGHT.

18 MS. VOLKAR: IT ESSENTIALLY SAYS THE SAME THING
19 TWICE.

20 SO IN MY MIND, IF WE WERE TO KEEP THAT SENTENCE, THE ONLY
21 THING THAT OCCURS BETWEEN IS SAYING "YOU'RE NOT TO CONSIDER
22 ESSENTIALLY ANYTHING INVOLVING MS. HOLMES."

23 SO FROM THE GOVERNMENT'S PERSPECTIVE, THIS LAST LINE IS
24 REALLY DISTINGUISHING THAT YOU MUST CONSIDER THE EVIDENCE
25 AGAINST MR. BALWANI, OR I SUGGESTED TO MS. WALSH REGARDING

10:11AM 1 MR. BALWANI IF WE DIDN'T WANT TO SAY AGAINST OR FOR AS THEIR
10:12AM 2 FOOTNOTE INDICATED.

10:12AM 3 MS. WALSH: YES, YOUR HONOR.

10:12AM 4 SO I DON'T THINK THAT THE ISSUE OF REPEATING IN THIS TRIAL
10:12AM 5 IS AN ISSUE AT ALL.

10:12AM 6 I THINK WHAT THE COURT HAS SUGGESTED, "YOU MUST BASE YOUR
10:12AM 7 VERDICT SOLELY ON THE EVIDENCE RECEIVED IN THIS TRIAL," IS
10:12AM 8 EXTREMELY CLEAR, AND WE THINK THAT'S WHAT THE COURT SHOULD GO
10:12AM 9 WITH IN THIS INSTRUCTION.

10:12AM 10 THE COURT: ALL RIGHT. THANK YOU.

10:12AM 11 I'LL -- IT IS SOMEWHAT REDUNDANT, BUT I'LL READ "RECEIVED
10:12AM 12 IN THIS TRIAL," PERIOD. AND IF YOU COULD MAKE THAT NOTE,
10:12AM 13 MS. VOLKAR.

10:12AM 14 MS. VOLKAR: WILL DO, YOUR HONOR.

10:12AM 15 THE COURT: NEXT IN THE PACKET THAT I HAVE -- AND IF
10:12AM 16 THERE'S ANYTHING NEW THAT HAS COME OUT, PLEASE SING OUT.

10:13AM 17 NEXT I HAVE IS INSTRUCTION 13. IT'S HIGHLIGHTED. AND
10:13AM 18 THIS IS OPINION EVIDENCE, EXPERT WITNESS.

10:13AM 19 MS. WALSH: YES, YOUR HONOR.

10:13AM 20 SO THIS WOULD APPLY TO MR. SONNIER, AND I THINK THERE WAS
10:13AM 21 SOME DISCUSSION BEFORE HE TESTIFIED AS TO WHETHER THIS
10:13AM 22 INSTRUCTION, WHICH IS THE MODEL INSTRUCTION, SHOULD APPLY OR
10:13AM 23 WHETHER HE SHOULD BE PUT INTO THE DUAL ROLE TESTIMONY.

10:13AM 24 WE DON'T HAVE A STRONG OPINION. I THINK IT'S FINE TO HAVE
10:13AM 25 JURY INSTRUCTION NUMBER 13, WHICH IS THE OPINION EVIDENCE

10:13AM 1 INSTRUCTION, APPLY TO MR. SONNIER.

10:13AM 2 AND THE ONLY OTHER REQUEST WE WOULD MAKE IS TO TAKE OUT
10:13AM 3 "III" AFTER HIS NAME ONLY BECAUSE HE WAS SWORN AS
10:13AM 4 RICHARD SONNIER. SO I DON'T THINK "III" IS NECESSARY.

10:14AM 5 THE COURT: MS. VOLKAR.

10:14AM 6 MS. VOLKAR: WELL, IT SOUNDS LIKE THE PARTIES AGREE
10:14AM 7 THAT MR. SONNIER SHOULD BE INCLUDED IN NUMBER 13 AND STRUCK
10:14AM 8 FROM NUMBER 14.

10:14AM 9 THE GOVERNMENT OBVIOUSLY AGREES WITH THAT POSITION.

10:14AM 10 IF WHAT WE'RE DOWN TO IS WHETHER OR NOT TO STRIKE "III," I
10:14AM 11 WOULD JUST POINT OUT THAT'S HIS NAME IN THE DECLARATION, BUT I
10:14AM 12 DON'T FEEL STRONGLY ABOUT IT.

10:14AM 13 THE COURT: OKAY. SO I WANT TO TALK ABOUT THE DUAL
10:14AM 14 ROLE, PARDON ME, INSTRUCTION NUMBER 15, DUAL ROLE INSTRUCTION.

10:14AM 15 I DO -- WHAT I HEAR THE PARTIES SAYING IS MR. SONNIER
10:14AM 16 SHOULD NOT APPEAR IN THAT.

10:14AM 17 MS. WALSH: CORRECT, YOUR HONOR.

10:14AM 18 MS. VOLKAR: CORRECT, YOUR HONOR.

10:14AM 19 THE COURT: SO LET ME ASK ABOUT DOCTORS ZACHMAN AND
10:14AM 20 BURNES. AND THEY DID TESTIFY REGARDING, AND THEY WERE FOUND,
10:15AM 21 PURSUANT TO THE REQUESTS OF THE PARTIES, THEY WERE FOUND TO BE
10:15AM 22 EXPERTS IN LIMITED AREAS, HCG WITH DR. ZACHMAN, AND I THINK ANY
10:15AM 23 PROSTATE ISSUES, PSA REGARDING DR. BURNES.

10:15AM 24 THEY TESTIFIED ABOUT FACTS -- I WAS REVIEWING DR. ZACHMAN,
10:15AM 25 AND THERE WAS A FACT COLLOQUY FOR SEVERAL PAGES BEFORE

1 DR. ZACHMAN WAS QUALIFIED AS AN EXPERT, AND THEN AFTER SHE WAS
2 QUALIFIED FOR HCG, THERE WERE QUESTIONS THEN POSED REGARDING
3 HCG AND ITS MEANINGS AND THOSE TYPES OF THINGS.

4 DURING THEIR TESTIMONY, NEITHER PARTY REQUESTED, AND THE
5 COURT DID NOT GIVE, ANY TYPE OF AN INSTRUCTION TO THE JURY
6 ABOUT THE DISTINCTION BETWEEN FACT AND EXPERT TESTIMONY.

7 WHEN I REVIEWED THE TRANSCRIPT, IT APPEARED TO ME THAT,
8 JUST LOOKING AT IT, THESE DOCTORS' TESTIMONIES, THESE -- OR THE
9 JURY WOULD NOT HAVE BENEFITTED, I USE THAT WORD, WOULD NOT NEED
10 THAT TYPE OF INSTRUCTION BECAUSE OF THE SPECIFICITY IN THE WAY
11 THAT THEY WERE EXAMINED AND THE QUESTIONS THAT WERE POSED TO
12 THEM REGARDING THEIR EXPERTISE.

13 THERE WERE QUESTIONS ABOUT FACT PATTERNS. DR. ZACHMAN, I
14 THINK, WAS QUESTIONED, BUT DID YOU CALL THERANOS AND DID YOU
15 SPEAK TO SOMEONE ABOUT A DOCUMENT AND GOT -- RECEIVED THEIR
16 EXPLANATIONS. THAT'S FACT.

17 AND THE COURT DID NOT AT THAT TIME ADMONISH THE JURY THAT
18 THEY SHOULD CONSIDER FACTS SEPARATELY FROM EXPERT TESTIMONY.

19 AND SAME THING WITH DR. -- WITH DR. BURNES. THERE WERE
20 SIMILAR COLLOQUIES ABOUT HIS FINDINGS. HE TESTIFIED AS A FACT
21 WITNESS THAT HE CONTACTED THERANOS, AND WE KNOW THE RESULT OF
22 THAT, HE RECEIVED A FREE TEST, I GUESS, A FREE RETEST.

23 I'M INVITING THE PARTIES TO COMMENT AS TO YOUR POSITIONS
24 AS TO WHETHER OR NOT YOU THINK THAT THERE WAS A DEFICIT IN THE
25 RECORD OF NOT PROVIDING AN INSTRUCTION TO THE JURY AT THAT

10:17AM 1 POINT CLARIFYING FACT AND, EXCUSE ME, EXPERT TESTIMONY.

10:17AM 2 AND IF YOU FEEL IT APPROPRIATE, WHAT IS THE REMEDY? WE
10:17AM 3 HAVE THE TRANSCRIPTS. IF YOU WANT, I CAN -- I'M HAPPY TO
10:17AM 4 REOPEN EVIDENCE AND I CAN INSTRUCT BEFORE WE GIVE FINAL
10:17AM 5 INSTRUCTIONS TO CLARIFY ANY AMBIGUITY THAT YOU FEEL MIGHT EXIST
10:17AM 6 SUCH THAT WOULD RISE TO THE NECESSITY OF INSTRUCTING THE JURY
10:17AM 7 ON THIS PART.

10:17AM 8 AND LET ME JUST STEP BACK FOR A MOMENT AND SAY, WE SEE
10:18AM 9 THIS IN CRIMINAL CASES, IT COMES UP MOST FREQUENTLY WHEN LAW
10:18AM 10 ENFORCEMENT OFFICERS -- AND IT'S USUALLY IN DRUG CASES, ISN'T
10:18AM 11 IT? -- WHERE LAW ENFORCEMENT, UNDERCOVER OFFICERS OR OTHERS,
10:18AM 12 TESTIFY ABOUT THEIR INVESTIGATION, THEIR OBSERVATIONS, WHY THEY
10:18AM 13 MADE A -- THEY BELIEVED THERE WAS PROBABLE CAUSE TO MAKE A
10:18AM 14 STOP, WHY THEY HAD REASONABLE SUSPICION, ET CETERA.

10:18AM 15 AND DURING THEIR TESTIMONY, SOMETIMES IF THEY ARE
10:18AM 16 QUALIFIED AS AN EXPERT IN NARCOTICS INVESTIGATIONS,
10:18AM 17 IDENTIFICATION OF NARCOTICS, ET CETERA, DURING THAT TESTIMONY
10:18AM 18 THEY WILL SOMETIMES TALK ABOUT, WELL, I SAW THIS, AND BASED ON
10:18AM 19 MY TRAINING AND EXPERIENCE IT CAUSED ME TO BELIEVE X, AND THEN
10:18AM 20 THEY'LL SAY, I FOUND X, AND THEN TALK ABOUT THAT.

10:18AM 21 THAT'S USUALLY THE CASE WHERE THIS BLURS IN CRIMINAL
10:18AM 22 CASES -- I KNOW YOU'RE ALL EXPERIENCED IN THIS -- AND THAT'S
10:18AM 23 THE TYPICAL SCENARIO WHERE THE JURY MIGHT HAVE DIFFICULTY, AND
10:19AM 24 COURTS, JUDGES WILL INSTRUCT, JUST BECAUSE THE OFFICER SAID
10:19AM 25 THIS, IT'S NOT IN THEIR EXPERTISE, IT'S A FACT THAT THEY SAW A

10:19AM 1 FLAT TIRE, OR WHATEVER IT MIGHT BE.

10:19AM 2 I'M JUST CURIOUS AND, OUT OF AN ABUNDANCE OF CAUTION, I
10:19AM 3 WANTED TO RAISE THIS TOPIC WITH US HERE TO SEE IF YOU, IN YOUR
10:19AM 4 OPINIONS, FEEL THAT ANY OF THE EXPERT TESTIMONY REGARDING THE
10:19AM 5 LIMITED, LIMITED DISCUSSION THAT THEY HAD AND EXAMINATION BY
10:19AM 6 BOTH SIDES REQUIRES ANY FURTHER REFINEMENT TO THE JURY BEFORE
10:19AM 7 WE GIVE THEM THE CASE.

10:19AM 8 AND IF YOU WANT TO TALK WITH YOUR TEAMS ABOUT THAT, THAT'S
10:19AM 9 FINE. THAT COMES UP IN THIS DUAL ROLE TESTIMONY.

10:19AM 10 SO WHY DON'T WE -- UNLESS WE HAVE ANY OTHER QUESTIONS,
10:19AM 11 WHAT I THOUGHT WE WOULD DO IS PASS THIS WITH MY COMMENTS AND
10:19AM 12 LET YOU THINK ABOUT IT.

10:19AM 13 MS. WALSH: SURE.

10:19AM 14 MS. VOLKAR: I'M HAPPY TO SPEAK TO IT NOW, YOUR
10:19AM 15 HONOR, IF YOU --

10:19AM 16 THE COURT: SURE. YES, THAT'S FINE.

10:20AM 17 MS. VOLKAR: I THINK YOUR HONOR HAS SET FORTH BOTH
10:20AM 18 THE CASE LAW AND ALSO THE WAY THAT THE FACTS UNFOLDED IN THIS
10:20AM 19 TRIAL ACCURATELY, AND IT'S THE GOVERNMENT'S POSITION BOTH THAT
10:20AM 20 WE SET TO CONDUCT OUR DIRECT EXAMINATION IN A MANNER TO MAKE
10:20AM 21 THAT DISTINCTION BETWEEN THE FACT TESTIMONY AND THE EXPERT
10:20AM 22 TESTIMONY MORE CLEAR.

10:20AM 23 YOUR HONOR MAY RECALL THERE WAS SUBSTANTIAL DISCUSSION
10:20AM 24 ABOUT THE CONTOURS OF THESE DOCTORS TESTIFYING AS EXPERTS WITH
10:20AM 25 RESPECT TO THE HOLMES CASE, AND BEFORE THE HOLMES CASE, AND

1 ALTHOUGH I'M STRETCHING A LITTLE BIT HERE, I THINK IN
2 BALWANI -- IN MR. BALWANI ADOPTING SOME OF THE PRETRIAL MOTIONS
3 IN LIMINE OF HOLMES, HE MIGHT HAVE ALSO ADOPTED SOME OF THAT
4 DISCUSSION IF MY MEMORY IS SERVING ME THERE.

5 BUT REGARDLESS, THIS WAS A SUBSTANTIAL TOPIC OF DISCUSSION
6 IN THE HOLMES TRIAL, AND THAT'S PART OF WHY THE GOVERNMENT WAS
7 VERY THOUGHTFUL IN HOW IT CONDUCTED ITS DIRECT EXAMINATION.

8 AND BEYOND THAT, HOW YOUR HONOR INSTRUCTED THE JURORS,
9 AGAIN, IF MY MEMORY OF THE TRANSCRIPT IS CORRECT, WAS THAT THE
10 EXPERTISE WAS IN INTERPRETING THE SPECIFIC RESULTS. FOR
11 DR. ZACHMAN, IT WAS HCG. FOR DR. BURNES IT WAS PSA.

12 AND BECAUSE YOUR HONOR INSTRUCTED THAT THEY ARE AN EXPERT
13 OF INTERPRETING THE RESULTS OF THIS TEST, I THINK THAT ALSO
14 REALLY HELPS THE JURY IN TERMS OF IF THEY HAVE A PHONE CALL
15 WITH THERANOS, THAT'S MORE FACT AND NOT NECESSARILY THEY DON'T
16 HAVE SOME EXPERTISE IN HOW TO CONDUCT A PHONE CALL.

17 AND I THINK GIVEN THE WAY AND JUST THE NATURE OF THE FACTS
18 IN THIS CASE, THEY ARE DIFFERENT THAN THE FEDERAL AGENT IN THE
19 DRUG CASE, AND I THINK THAT THERE'S ENOUGH DISTINCTION THAT NO
20 INSTRUCTION WAS NEEDED IN THE MOMENT.

21 AND, OF COURSE, WE EXPECTED AND SUBMITTED THIS DUAL ROLE
22 INSTRUCTION IN OUR INITIAL PROPOSED INSTRUCTIONS. WE, ALL
23 ALONG, EXPECTED THAT THIS INSTRUCTION WOULD BE GIVEN AT THE
24 FINAL INSTRUCTION STAGE TO CLEAR UP ANY REMAINING
25 MISUNDERSTANDING IF THERE WAS ANY.

10:22AM 1 BUT WE THINK THAT THE RECORD IS CLEAR AND YOUR HONOR
10:22AM 2 DID -- THE COURT PUT ENOUGH GUARDRAILS IN THE MOMENT TO GIVE
10:22AM 3 THE JURY WHAT IT NEEDED TO KNOW WHAT WAS FACT AND WHAT WAS
10:22AM 4 EXPERT TESTIMONY.

10:22AM 5 THAT'S THE GOVERNMENT'S POSITION.

10:22AM 6 THE COURT: OKAY. THANK YOU.

10:22AM 7 MS. WALSH: YES, YOUR HONOR.

10:22AM 8 SO, FIRST, WE VERY MUCH APPRECIATE THE COURT GOING BACK
10:22AM 9 AND READING THAT TESTIMONY AND RAISING THIS ISSUE.

10:22AM 10 WE DO NOT THINK IT'S NECESSARY TO REOPEN THE RECORD TO
10:22AM 11 GIVE THAT INSTRUCTION, AND THAT THIS INSTRUCTION NUMBER 14 WILL
10:22AM 12 BE SUFFICIENT.

10:22AM 13 THE COURT: OKAY. ALL RIGHT. WELL, THANK YOU FOR
10:22AM 14 THE OPPORTUNITY TO AT LEAST LET ME DISCUSS IT WITH YOU, AND I
10:22AM 15 APPRECIATE YOUR EXPRESSIONS.

10:22AM 16 ALL RIGHT. SO JUST TO RECAP THEN, WE'RE ON JURY
10:22AM 17 INSTRUCTION 13, AND THE COURT WOULD READ OPINION EVIDENCE,
10:23AM 18 EXPERT WITNESS, AND READ IN MR. SONNIER, STRIKING "III," AND
10:23AM 19 WOULD OTHERWISE READ THOSE TWO PARAGRAPHS THEN.

10:23AM 20 ANY OBJECTION TO THAT?

10:23AM 21 MS. WALSH: NO, YOUR HONOR.

10:23AM 22 MS. VOLKAR: NO, YOUR HONOR.

10:23AM 23 THE COURT: ALL RIGHT. THEN TURNING TO 14, DUAL
10:23AM 24 ROLE TESTIMONY, THE COURT WOULD READ THIS, BUT STRIKE
10:23AM 25 RICHARD SONNIER.

10:23AM 1 MS. WALSH: YES, YOUR HONOR.

10:23AM 2 MS. VOLKAR: YES, YOUR HONOR.

10:23AM 3 THE COURT: NEXT IS INSTRUCTION NUMBER 28, WHICH IS
10:23AM 4 ALLEGED VIOLATIONS OF INDUSTRY STANDARDS.

10:23AM 5 AND I THINK THE NOTE THAT I HAVE, IT LOOKS LIKE
10:24AM 6 FOOTNOTE 6, SUGGESTS THAT MR. BALWANI WOULD LIKE THE LAST
10:24AM 7 SENTENCE STRICKEN. THAT'S ON LINE 7.

10:24AM 8 MS. WALSH: YES, YOUR HONOR.

10:24AM 9 THE COURT: THIS WAS GIVEN, I BELIEVE, IN THE HOLMES
10:24AM 10 CASE.

10:24AM 11 MS. WALSH: YES.

10:24AM 12 THE COURT: RIGHT.

10:24AM 13 MS. WALSH: AND THAT IS -- WE WOULD LIKE THAT
10:24AM 14 SENTENCE STRICKEN.

10:24AM 15 IF THE COURT IS INCLINED TO NOT STRIKE THAT SENTENCE, I
10:24AM 16 HAVE ANOTHER PROPOSAL.

10:24AM 17 THE COURT: OKAY. WHY DON'T WE HEAR THAT, SURE.

10:24AM 18 MS. WALSH: SO THIS WAS GIVEN IN THE HOLMES CASE,
10:24AM 19 AND AS I SAID WHATEVER DAY WE WERE TOGETHER TALKING ABOUT THIS,
10:24AM 20 WE DO THINK THAT, I'M GOING TO CALL IT SENTENCE NUMBER 3 OF
10:24AM 21 THIS INSTRUCTION, RUNS THE RISK, THE SERIOUS RISK OF UNDOING
10:24AM 22 SENTENCE NUMBER 2.

10:24AM 23 SENTENCE NUMBER 2 IS THE ONE THAT SAYS, "MR. BALWANI IS
10:25AM 24 NOT LIABLE FOR ANY OF THE OFFENSES JUST BASED ON REGULATORY
10:25AM 25 VIOLATIONS."

1 AND WE DO THINK THAT SENTENCE NUMBER 3 RUNS THE RISK OF
2 UNDOING THE IMPORT OF SENTENCE NUMBER 2.

3 WHAT WE WOULD PROPOSE, IF YOUR HONOR WANTS TO KEEP ALL
4 THREE SENTENCES, IS TO SWITCH THE ORDER OF SENTENCE 3 AND 2 SO
5 THAT THE INSTRUCTION WOULD READ FROM THE BEGINNING, "YOU HAVE
6 HEARD EVIDENCE REGARDING ALLEGED VIOLATIONS OF REGULATIONS AND
7 THE INDUSTRY STANDARDS. YOU MAY CONSIDER SUCH EVIDENCE, ALONG
8 WITH OTHER EVIDENCE LIMITED TO ANY PURPOSE FOR WHICH SUCH
9 EVIDENCE WAS ADMITTED, IN ASSESSING WHETHER THE GOVERNMENT HAS
10 PROVED EACH OF THE COUNTS CHARGED IN THE INDICTMENT. HOWEVER,
11 YOU MAY NOT FIND MR. BALWANI LIABLE FOR ANY OF THE OFFENSES,"
12 AND THEN THE REMAINING OF SENTENCE -- CURRENT SENTENCE 2.

13 AND THE REASON, YOUR HONOR, THAT I THINK THAT'S IMPORTANT
14 IS THAT THE WHOLE PURPOSE OF THIS INSTRUCTION IS TO REDUCE THE
15 RISK THAT JURORS WILL CONCLUDE CRIMINAL LIABILITY BASED ON A
16 NEGLIGENCE STANDARD, AND PUTTING THE SENTENCE THAT PROHIBITS
17 THEM FROM DOING THAT LAST I THINK EMPHASIZES THE POINT OF NOT
18 DOING THAT.

19 AND I DON'T THINK, IF WE SWITCH THE ORDER, THAT SENTENCE
20 WILL UNDO THE, "YOU MAY CONSIDER SUCH EVIDENCE IN ASSESSING
21 WHETHER THE GOVERNMENT HAS PROVED."

22 THE COURT: MS. VOLKAR.

23 MS. VOLKAR: YOUR HONOR, I THINK WE'RE GOING TO LAND
24 WITH THE GOVERNMENT WOULD BE FINE WITH SWAPPING THE ORDER OF
25 THE SENTENCES.

1 BUT I DO WANT TO STATE FOR THE RECORD WHY THE GOVERNMENT
2 THINKS IT'S CRITICALLY IMPORTANT TO KEEP BOTH SENTENCES.

3 THIS INSTRUMENTALITY WAS NOT OBJECTED -- SORRY.

4 THIS ENTIRE INSTRUCTION WAS NOT OBJECTED TO IN DEFENDANT'S
5 FILING ECF 1476, AND I WAS NOT FULLY PREPARED TO DISCUSS IT ON
6 WEDNESDAY.

7 AS A RESULT OF IT, I HAVE SINCE HAD TIME TO REFRESH MY
8 MEMORY OF THE DEBATE IN THE HOLMES TRIAL AND HOW WE ARRIVED AT
9 THIS LANGUAGE.

10 AND AS MS. WALSH HAS ARGUED, AND THE HOLMES DEFENSE TEAM
11 ARGUED AS WELL, THE CONCERN DRIVING THIS INSTRUCTION IS THAT
12 THE JURY MAY LOOK AT THE CMS REPORT OR OTHER EVIDENCE THAT'S
13 BEEN INTRODUCED IN THIS CASE THAT HAS A REGULATORY SLANT TO IT
14 AND PERHAPS REACH SOME CONCLUSION ON A LESSER STANDARD OR A
15 CIVIL STANDARD, A LIABILITY STANDARD.

16 THAT'S WHY THE WORD "LIABILITY" IS IN THERE, AND WE --
17 EVERYONE, I THINK, WANTS TO ENSURE THAT THE JURY KNOWS THIS IS
18 A CRIMINAL CASE, THE STANDARDS ARE WHAT THE COURT HAS LAID OUT
19 IN THE EARLIER INSTRUCTIONS, NOT THIS INSTRUCTION.

20 THAT BEING SAID, WHAT THE GOVERNMENT WANTED TO -- SO
21 THAT'S SORT OF WHY THE OTHER TWO SENTENCES WERE PROPOSED.

22 AND WHY THE GOVERNMENT WANTED THIS THIRD SENTENCE IS
23 BECAUSE WHAT WE ALSO WANT TO AVOID IS THE DEFENSE BEING ABLE TO
24 ARGUE, OR EVEN IMPLY, THAT THIS EVIDENCE IS WHOLLY IRRELEVANT
25 AND THAT BECAUSE SOME PORTIONS OF THE CMS REPORT HAD TO DO WITH

10:28AM 1 REFRIGERATION, I KNOW THEY BROUGHT THAT OUT ON
10:28AM 2 CROSS-EXAMINATION, THAT THEY SHOULD THROW THE WHOLE REPORT OUT
10:28AM 3 AND JUST IGNORE IT AS IRRELEVANT EVIDENCE TO THE CRIMINAL
10:28AM 4 CHARGES AGAINST MR. BALWANI.

10:28AM 5 THAT, FROM THE GOVERNMENT'S PERSPECTIVE, WOULD BE ERROR,
10:28AM 6 BECAUSE THE CMS REPORT IS RELEVANT. THE COURT FOUND THAT.

10:29AM 7 AND IT ALSO HAD KEY FINDINGS, SUCH AS THE EDISONS
10:29AM 8 CONSISTENTLY FAILING QC CONTROL, WHICH, OF COURSE, CORRESPONDS
10:29AM 9 WITH TESTIMONY FROM OTHER WITNESSES SUCH AS ERIKA CHEUNG,
10:29AM 10 DR. MARK PANDORI AND DR. ADAM ROSENDORFF.

10:29AM 11 SO THE GOVERNMENT'S POSITION IS THAT THIS THIRD SENTENCE
10:29AM 12 MUST BE IN TO TELL THE JURY THAT THEY MAY CONSIDER THAT
10:29AM 13 EVIDENCE AS IT RELATES TO THE ACTUAL CHARGES OF WIRE FRAUD, NOT
10:29AM 14 FOR THE CIVIL LIABILITY PURPOSES.

10:29AM 15 AND I'M JUST NOW HEARING MS. WALSH'S SUGGESTION OF
10:29AM 16 SWAPPING THE ORDER. I DON'T HAVE STRONG FEELINGS ABOUT THAT,
10:29AM 17 AS LONG AS BOTH CONCEPTS ARE INCLUDED IN THE INSTRUCTION,
10:29AM 18 BECAUSE I THINK THAT THAT STRIKES THE BALANCE BETWEEN BOTH
10:29AM 19 PARTIES' PERSPECTIVE.

10:29AM 20 THE COURT: SO DO YOU WANT TO -- DO YOU HAVE A
10:29AM 21 PRINTED COPY OF THE SWAPPED LANGUAGE? LET ME SAY THAT I'M
10:29AM 22 INCLINED TO SWAP THE PLACEMENT OF THOSE SENTENCES IF YOU WOULD
10:30AM 23 LIKE.

10:30AM 24 AND IF YOU WANT TO PREPARE IT AS SUCH AND THEN SHARE THAT
10:30AM 25 WITH MS. VOLKAR AND HAVE AGREEMENT ON IT --

10:30AM 1 MS. WALSH: YES, YOUR HONOR.

10:30AM 2 THE COURT: -- YOU CAN SUBMIT THAT IN THE PROPOSED
10:30AM 3 FINAL AND WE'LL LOOK AT IT.

10:30AM 4 MS. WALSH: YES, YOUR HONOR.

10:30AM 5 THE COURT: AND I HAVE NO OBJECTION TO THAT.

10:30AM 6 MS. WALSH: GREAT. WE WILL DO THAT.

10:30AM 7 THE COURT: THANK YOU.

10:30AM 8 THE NEXT IN THE PACKET IS THE ADVERSE INFERENCE FOR
10:30AM 9 MISSING EVIDENCE INSTRUCTION. WE DISCUSSED THAT YESTERDAY.
10:30AM 10 THE COURT IS NOT GOING TO GIVE THIS.

10:30AM 11 AND THEN I'M AT THE 7 SERIES.

10:30AM 12 DO YOU WANT TO TALK ABOUT -- AND I'LL GIVE THE 7 SERIES,
10:30AM 13 THAT IS THE CONCLUDING INSTRUCTIONS, UNLESS THERE'S ANY CHANGES
10:30AM 14 IN THOSE.

10:30AM 15 MS. WALSH: NO CHANGES FROM THE DEFENSE, YOUR HONOR.

10:30AM 16 MS. VOLKAR: NO CHANGES FROM THE GOVERNMENT, YOUR
10:30AM 17 HONOR.

10:30AM 18 I THINK WHERE YOU WERE ABOUT TO LAND NEXT IS I THINK THE
10:30AM 19 LAST REMAINING DISPUTE BETWEEN THE PARTIES IS THE PLACEMENT OF
10:30AM 20 THIS INDUSTRY STANDARDS INSTRUCTION.

10:30AM 21 AS I INDICATED EARLIER, IT MAKES SENSE TO TALK ABOUT IT
10:30AM 22 RIGHT AFTER TALKING ABOUT THE SUBSTANCE OF IT IN MY MIND.

10:30AM 23 THE COURT: CORRECT.

10:30AM 24 SO WHERE SHOULD IT GO FROM THE GOVERNMENT'S PERSPECTIVE?

10:31AM 25 MS. VOLKAR: FROM THE GOVERNMENT'S PERSPECTIVE,

DISCUSSING WHAT IS NOT THE CHARGES IN THIS CASE SHOULD NOT COME BEFORE DISCUSSING WHAT ARE THE CHARGES AND WHAT IS THE GOVERNMENT'S BURDEN IN THIS CASE.

AND THERE HAVE BEEN -- DURING THE MEET AND CONFER PROCESS, THERE WERE A COUPLE OF ITERATIONS OF WHERE THE DEFENSE WANTED THIS, AND IF YOU LOOK AT THE TABLE OF CONTENTS ON THE FIRST PAGE OF WHAT WE SUBMITTED, YOU'LL SEE THAT WHERE THEY LANDED IN THE VERSION THAT WE SENT TO THE COURT IS RIGHT AFTER -- I SHOULD TAKE A STEP BACK AND LET THE COURT KNOW, THE DEFENSE IS ALSO PROPOSING REARRANGING SEVERAL OF THE -- I HESITATE TO CATEGORIZE THEM, BUT IN THE MODEL INSTRUCTIONS, THEY WERE PART OF THE 3 SERIES, SO YOUR HONOR MIGHT BE FAMILIAR WITH THAT.

THE DEFENSE HAS SUGGESTED MOVING AROUND SEVERAL OF THE INSTRUCTIONS FROM THE ORDER WE JUST WALKED THROUGH.

THE GOVERNMENT LARGELY DOES NOT OBJECT TO THE MOVEMENT OF THOSE.

BUT WHAT THE GOVERNMENT DOES OBJECT TO, IF YOU'RE LOOKING AT THE TABLE OF CONTENTS, IS THEY'VE MOVED THE INDUSTRY STANDARDS INSTRUCTION TO NUMBER 16 BEFORE THE COURT EVEN DEFINES CONSPIRACY, LET ALONE WIRE FRAUD.

AND THE GOVERNMENT'S MAIN CONCERN THERE, WE UNDERSTAND THE LOGICAL CONNECTION BETWEEN THE INDUSTRY STANDARDS INSTRUCTION AND THE ACTIVITIES NOT CHARGED INSTRUCTION THAT IT CURRENTLY IS FOLLOWING IN THEIR FORMAT, BUT WHAT WE DON'T UNDERSTAND IS WHY WE WOULD TELL THE JURY WHAT THEY'RE NOT TO DO BEFORE

1 INSTRUCTING THE JURY OF WHAT THEY ARE TO DO.

2 AND I ALSO WOULD POINT OUT FOR THE COURT THAT THE WAY THAT
3 THE MODEL INSTRUCTIONS SUGGEST PROCEEDING AND HOW MOST OF THE
4 REST OF THE INSTRUCTIONS PROCEED IS TO GIVE A DEFINITION AND
5 THEN EITHER FURTHER DEFINE IT AND SUPPLEMENT IT, OR DESCRIBE
6 WHAT IS THE OPPOSITE OR NOT PART OF THAT.

7 SO THE FIRST EXAMPLE THAT I SEE ON THE PAGE IS WHAT IS
8 EVIDENCE IS FOLLOWED BY WHAT IS NOT EVIDENCE.

9 CREDIBILITY OF WITNESSES IS FOLLOWED BY SPECIFIC CATEGORY
10 OF WITNESSES, AND SHOULD THAT OR SHOULD THAT NOT CHANGE THE
11 JURY'S WEIGHING OF CREDIBILITY.

12 CONSPIRACY IS DEFINED -- SORRY. THEN CONSPIRACY AND THEN
13 THE DEFINITION OF A MENS REA.

14 I KNOW THE GOVERNMENT DISAGREES WITH "WILLFULLY," BUT I'M
15 MAKING A DIFFERENT POINT HERE.

16 AND THEN LATER, WIRE FRAUD, FOLLOWED BY FURTHER DEFINITION
17 OF THE MENS REA, INTENT TO DEFRAUD, GOOD FAITH, KNOWINGLY.

18 WHERE WE HAD IT AND WHERE THE PARTIES HAD IT IN THE HOLMES
19 CASE IS WHAT MAKES THE MOST SENSE TO THE GOVERNMENT, WHICH IS
20 WITH OTHER DESCRIPTIONS SORT OF FURTHER BUILDING OUT WHAT IS
21 AND IS NOT PROPERLY CONSIDERED BY THE JURY GIVEN THE SPECIFIC
22 FACTS OF THIS CASE, AND THAT'S WHAT IS ON THE TABLE OF CONTENTS
23 NUMBER 27, NUMBER 28, THE VICTIM'S CONDUCT, NAMELY, THAT THE
24 DEFENDANT CAN'T BLAME THE VICTIM, SUCCESS OF THE WIRE FRAUD
25 SCHEME.

10:34AM 1 I THINK IT FALLS INTO THAT CATEGORY.

10:34AM 2 I'M NOT OPPOSED TO MOVING IT SOMEWHERE ELSE, BUT I AM
10:34AM 3 OPPOSED TO HAVING IT BE DEFINED FOR THE JURY BEFORE THEY'RE
10:34AM 4 EVEN TOLD WHAT ELEMENTS THEY HAVE TO FIND BEYOND A REASONABLE
10:34AM 5 DOUBT.

10:34AM 6 THE COURT: THANK YOU.

10:34AM 7 MS. WALSH.

10:34AM 8 MS. WALSH: YES, YOUR HONOR, THANK YOU.

10:34AM 9 WE COMPLETELY DISAGREE. IT MAKES PERFECT SENSE TO ME TO
10:34AM 10 INSTRUCT THE JURY AFTER INSTRUCTIONS ABOUT TESTIMONY,
10:35AM 11 CREDIBILITY OF WITNESSES, ON OR ABOUT, ET CETERA, THAT THE
10:35AM 12 COURT THEN INSTRUCT ON ACTIVITIES NOT CHARGED, WHICH IS IN
10:35AM 13 ESSENCE MR. BALWANI IS NOT CHARGED WITH ACTIONS AND STATEMENTS
10:35AM 14 OUTSIDE OF THE TIME PERIOD OF THE INDICTMENT.

10:35AM 15 IT LOGICALLY FOLLOWS AFTER THAT THAT THE COURT WOULD ALSO
10:35AM 16 INSTRUCT THE JURY THAT HE'S NOT CHARGED WITH CIVIL VIOLATIONS
10:35AM 17 AND THE INSTRUCTION THAT RELATES TO HOW THEY CAN PROPER -- HOW
10:35AM 18 THE JURY COULD PROPERLY CONSIDER POTENTIAL CIVIL VIOLATIONS IN
10:35AM 19 DRAWING CONCLUSIONS ABOUT GUILT IN A CRIMINAL CASE.

10:35AM 20 THEN IT MAKES SENSE, AFTER WE'VE CARVED OUT WHAT HE'S NOT
10:35AM 21 CHARGED WITH AND WHAT YOU CAN'T CONSIDER OR WHAT YOU CAN ONLY
10:35AM 22 CONSIDER IN A LIMITED WAY, TO THEN GO THROUGH ALL OF THE
10:35AM 23 ELEMENTS FOR EACH OF THE CRIMES HE IS CHARGED WITH, AND THAT'S
10:35AM 24 A LENGTHY RECITATION OF COMPLICATED CONCEPTS AND DEFINITIONS
10:36AM 25 THAT I THINK SHOULD COME AFTER THE JURY IS CLEAR ABOUT WHAT HE

10:36AM 1 IS NOT CHARGED WITH.

10:36AM 2 THE COURT: ALL RIGHT. THANK YOU.

10:36AM 3 I NOTICE IN THE HOLMES CASE IT WAS INSTRUCTION NUMBER 28,
10:36AM 4 I BELIEVE, AND THAT WAS THE LAST INSTRUCTION BEFORE THE 7
10:36AM 5 SERIES, THAT IS, THE DUTY TO DELIBERATE INSTRUCTIONS. IT WAS
10:36AM 6 THE FINAL INSTRUCTION THAT WAS GIVEN IN THAT CASE.

10:36AM 7 AND WHEN I LOOKED AT THIS EARLIER, MY VISCERAL REACTION
10:36AM 8 WAS THE PLACE FOR IT WOULD BE, AS MS. VOLKAR SUGGESTED, IT
10:36AM 9 SEEMED TO ME SHOULDN'T THIS FALL INTO THE CATEGORY WE'RE
10:36AM 10 TALKING ABOUT, AND WHEN THE JURY IS BEING INFORMED ABOUT ALL OF
10:36AM 11 THE ELEMENTS AND THE DEFINITIONS OF THE ELEMENTS, DOESN'T IT
10:36AM 12 MAKE SENSE TO TELL THEM WHAT THEY CAN'T DO AND WHAT THEY
10:37AM 13 SHOULDN'T DO?

10:37AM 14 ONE OF THE THOUGHTS I HAD WAS, WELL, IF YOU PUT IT EARLY,
10:37AM 15 IT GETS DILUTED BY THE OTHER INSTRUCTIONS, DOESN'T IT?

10:37AM 16 MS. WALSH: I GUESS I THINK IT SERVES THE PURPOSE OF
10:37AM 17 CABINING WHAT THE JURY CAN CONSIDER AND NOT CONSIDER WHEN
10:37AM 18 THEY'RE LISTENING TO THE INSTRUCTIONS ABOUT THE LAW ON THE
10:37AM 19 CRIMES THAT ARE CHARGED.

10:37AM 20 AND TO ME, THAT SEEMS TO BE HELPFUL THAT, OKAY, WE HEARD
10:37AM 21 THIS TESTIMONY ABOUT THE CMS REPORT AND SARAH BENNETT, AND WE
10:37AM 22 HEARD THE TESTIMONY ABOUT THE STATEMENTS IN 2006. OKAY, THE
10:37AM 23 COURT HAS TOLD US THAT MR. BALWANI IS NOT CHARGED WITH THAT AND
10:37AM 24 WE SHOULDN'T RELY ON NEGLIGENCE OR POTENTIAL REGULATORY
10:37AM 25 VIOLATIONS IN ASSESSING OUR -- OR COMING TO OUR VERDICT.

1 AND THEN THE COURT WALKS THEM THROUGH, OKAY, HERE IS THE
2 LAW ON WHAT IS CHARGED.

3 TO ME THAT MAKES CONCEPTUAL SENSE.

4 BUT I UNDERSTAND THE COURT -- THIS IS HOW IT WAS DONE IN
5 THE HOLMES TRIAL. I JUST THINK IT MAKES MORE LOGICAL SENSE TO
6 PUT THEM UP FRONT.

7 THE COURT: OKAY. SO WHAT IS HELPFUL FOR THE
8 JURY -- I SUPPOSE WHEN I LOOK AT IT, AND THE WAY WE DID IT IN
9 THE HOLMES CASE, THEY'RE GIVEN THE INSTRUCTIONS, HERE'S
10 EVERYTHING THAT THE GOVERNMENT HAS TO PROVE, HERE'S WHAT THEY
11 HAVE TO PROVE, LADIES AND GENTLEMEN, LISTEN TO THIS.

12 OH, AND BY THE WAY, AT THE CONCLUSION OF ALL THAT, BY THE
13 WAY, YOU CAN'T CONSIDER -- WHEN YOU CONSIDER ALL OF THESE
14 THINGS, YOU MAY NOT CONSIDER ANY REGULATIONS, ANY REGULATORY
15 VIOLATIONS THAT, IN YOUR THOUGHT PROCESS AS YOU GO THROUGH ALL
16 OF THE OTHER, THE WIRE FRAUD AND THE OTHER THINGS, YOU'RE NOT
17 TO CONSIDER THAT.

18 IT JUST SEEMS LIKE THAT'S MORE LOGICAL THAN TO TELL THEM,
19 YOU MAY NOT CONSIDER THE FOLLOWING AMONGST ALL OF THE
20 INSTRUCTIONS THAT I'M ABOUT TO GIVE YOU.

21 AND SO THEY KEEP THAT IN THEIR MIND. LET ME REMEMBER.
22 LET ME GO BACK.

23 THERE'S JUST SOMETHING THAT WE'RE ASKING THEM TO REMEMBER
24 A NEGATIVE WHILE THEY LISTEN TO A POSITIVE, I SUPPOSE, IS A
25 VERY BASIC WAY I'D PUT IT.

1 IT JUST SEEMS TO ME THAT ONCE WE TELL -- ONCE THEY'RE
2 INFORMED, THIS IS THE BURDEN OF PROOF, AND THESE ARE THE
3 ELEMENTS OF THE OFFENSE, AND THE LAST THING THAT THEY'LL HEAR,
4 AT LEAST CONCLUDING THOSE ELEMENTS, ARE YOU MAY NOT CONSIDER
5 THESE REGULATORY ISSUES AS YOU THINK ABOUT ALL OF THESE OTHER
6 ELEMENTS THAT THE GOVERNMENT HAS TO PROVE.

7 THAT SEEMS TO HAVE SOME -- AND MAYBE I'M JUST, MAYBE I'M
8 JUST OLD AND THAT'S THE WAY MY MIND WORKS. BUT IT SEEMS LIKE
9 THAT HAS A BETTER FLOW TO IT.

10 MS. WALSH: I UNDERSTAND. AND, OF COURSE, WE WANT
11 TO DO WHAT IS -- WHAT WILL MAKE THE INSTRUCTIONS MOST CLEAR FOR
12 THE JURY. I THINK WE'RE ALL ON -- WE HAVE THE SAME GOAL.

13 I GUESS I THOUGHT IT WAS CLEAR TO CARVE OUT WHAT IS NOT
14 CHARGED AND WHAT THEY SHOULDN'T CONSIDER FIRST.

15 BUT THE WAY THIS ALL STARTED, THE REORDERING EXERCISE, WAS
16 THE CIVIL VIOLATIONS INSTRUCTION WAS SO FAR AWAY FROM THE
17 INSTRUCTIONS ABOUT THE ELEMENTS THAT THE COURT SUGGESTED, WELL,
18 MAYBE WE SHOULD MOVE IT UP, AND SO WE WENT THROUGH THE EFFORT
19 OF MOVING IT UP.

20 THE COURT: RIGHT.

21 MS. WALSH: I THINK IF THE COURT IS INCLINED TO NOT
22 ACCEPT THE DEFENSE'S RECOMMENDATION THAT IT COME AFTER
23 ACTIVITIES NOT CHARGED, MORE TOWARD THE FRONT, THAT AT LEAST WE
24 SHOULD MOVE IT TO AFTER THE INSTRUCTION REGARDING THE ELEMENTS
25 OF WIRE FRAUD.

10:41AM 1 SO -- AND WHEREVER THE COURT THINKS THAT'S APPROPRIATE,
10:41AM 2 EITHER AFTER 21 OR AFTER 22, SOMEWHERE IN THERE, SO THAT IT IS
10:41AM 3 CLOSE IN PROXIMITY TO THE ELEMENTS.

10:42AM 4 (PAUSE IN PROCEEDINGS.)

10:42AM 5 THE COURT: SORRY. I'M PARSING THROUGH THEM AND
10:42AM 6 TRYING TO SEE IF, AT LEAST IN MY MIND, THERE'S A LOGICAL PLACE.

10:42AM 7 MS. WALSH: SURE.

10:42AM 8 MS. VOLKAR: YOUR HONOR, MAY I BE HEARD ON THAT?

10:42AM 9 THE COURT: YES.

10:42AM 10 MS. VOLKAR: SO THE DEFENSE MADE THE SUGGESTION THAT
10:42AM 11 MS. WALSH JUST MADE DURING OUR MEET AND CONFER, AND THE
10:42AM 12 GOVERNMENT'S RESPONSE THERE IS THAT WE DON'T ACTUALLY OPPOSE
10:42AM 13 MOVING THE INSTRUCTION UP FROM IT WHERE IT WAS GIVEN IN THE
10:42AM 14 HOLMES CASE.

10:42AM 15 BUT AS I STATED INITIALLY, WE DO OBJECT TO SEPARATING THE
10:42AM 16 DEFINITION OF ELEMENTS FROM WHAT WE CONSIDER KEY DEFINITIONS,
10:42AM 17 AND THAT'S THE MENS REA.

10:42AM 18 SO THE DIFFICULTY OR THE PROBLEM THAT THE GOVERNMENT HAS
10:42AM 19 WITH MS. WALSH'S SECONDARY SUGGESTION TO THE COURT IS WIRE
10:43AM 20 FRAUD IS IMMEDIATELY FOLLOWED BY WHAT WE WOULD SAY ARE
10:43AM 21 IMPORTANT INSTRUCTIONS ABOUT WHAT DOES INTENT TO DEFRAUD MEAN,
10:43AM 22 WHAT DOES KNOWINGLY MEAN?

10:43AM 23 I IMAGINED THEY WOULD SAY THE GOOD FAITH INSTRUCTION WAS
10:43AM 24 IMPORTANT TO THEM, AND IT WAS IMPORTANT TO THE HOLMES TEAM.

10:43AM 25 ALL OF THOSE ARE DEFINING WHAT THE ELEMENTS ARE IN WIRE

10:43AM 1 FRAUD.

10:43AM 2 AND OUR COUNTER-PROPOSAL WAS IF THE DEFENSE STILL WANTS TO
10:43AM 3 MOVE IT UP, WE KNOW THAT THOSE MENS REA INSTRUCTIONS ARE NOT
10:43AM 4 PARTICULARLY LENGTHY, THE INDUSTRY STANDARDS INSTRUCTION CAN BE
10:43AM 5 MOVED AFTER KNOWINGLY IS DEFINED, BUT BEFORE GETTING INTO
10:43AM 6 AIDING AND ABETTING OR VICARIOUS LIABILITY OR OTHER
10:43AM 7 INSTRUCTIONS LIKE THAT.

10:43AM 8 THAT WAS THE GOVERNMENT'S COUNTER SUGGESTION.

10:43AM 9 THE COURT: HOW ABOUT THAT, MS. WALSH?

10:43AM 10 MS. WALSH: YES, AS A COUNTER THAT WOULD BE
10:43AM 11 ACCEPTABLE.

10:43AM 12 I JUST WANT THE RECORD TO REFLECT THAT WE DID MAKE THE
10:44AM 13 REQUEST TO MOVE IT UP, AND WE PREFER THAT. BUT AS AN
10:44AM 14 ALTERNATIVE, THAT SEEMS REASONABLE TO US.

10:44AM 15 THE COURT: SO IT WOULD BE BETWEEN 24 AND 25 ON THE
10:44AM 16 CHART THAT I HAVE?

10:44AM 17 MS. WALSH: CORRECT.

10:44AM 18 MS. VOLKAR: CORRECT, YOUR HONOR.

10:44AM 19 THE COURT: ALL RIGHT. I'LL ACCEPT YOUR REQUEST ON
10:44AM 20 THAT, NOTING THAT I THINK IT FITS BETTER, AND IT HAS MORE
10:44AM 21 EFFECT IF THE DEFENSE WANTS, FOR EFFECT, TO PUT IT AT THE END
10:44AM 22 OF ALL OF THOSE ELEMENTS AS WE DID IN THE HOLMES CASE.

10:44AM 23 MY VIEW IS THAT HAVING THIS INSTRUCTION, AS IMPORTANT AS
10:44AM 24 IT IS FROM THE DEFENSE, HAVING IT APPEAR EARLIER TENDS TO
10:44AM 25 DILUTE ITS VALUE. THAT'S JUST MY HIGH LEVEL OBSERVATION.

10:44AM 1 IT WAS PLACED AT THE END, THE LAST THING, THE LAST FORMAL
10:44AM 2 INSTRUCTION ON THE LAW REGARDING THE HOLMES CASE, THAT WAS THE
10:45AM 3 LAST ONE THEY HEARD BEFORE THE CONCLUDING INSTRUCTIONS AS TO
10:45AM 4 THEIR OBLIGATIONS AS THEY DECIDE THE CASE, AND I THOUGHT IT FIT
10:45AM 5 PERFECTLY THERE AS A SEPARATE STAND ALONE THAT ALL COUNSEL
10:45AM 6 COULD REFERENCE AND SAY THERE'S A SPECIAL INSTRUCTION ON THIS,
10:45AM 7 IT'S SEPARATE, IT'S AT THE END, AND IT JUST SEEMED THAT THAT'S
10:45AM 8 A BETTER PLACE FOR IT.

10:45AM 9 BUT I WILL ACCEPT YOUR REQUEST AND IT CAN BE PLACED
10:45AM 10 BETWEEN KNOWINGLY AND AIDING AND ABETTING.

10:45AM 11 MS. WALSH: THANK YOU, YOUR HONOR.

10:45AM 12 MS. VOLKAR: THANK YOU, YOUR HONOR.

10:45AM 13 THE COURT: DOES THAT CONCLUDE OUR DISCUSSION ON THE
10:45AM 14 INSTRUCTIONS?

10:45AM 15 MS. VOLKAR: I BELIEVE IT DOES.

10:45AM 16 MS. WALSH: I JUST WANT TO MAKE SURE -- THERE WAS
10:45AM 17 SOME OTHER REORDERING THAT THE PARTIES AGREED ON THAT APPEARS
10:45AM 18 IN THIS DOCUMENT ON PAGES 1 THROUGH 2. I JUST WANTED TO MAKE
10:45AM 19 SURE THE COURT WAS OKAY WITH THAT.

10:45AM 20 THE COURT: SURE. I LOOK AT THE LIST HERE THAT I
10:45AM 21 HAVE, IT'S 1 THROUGH 35?

10:45AM 22 MS. WALSH: CORRECT.

10:45AM 23 THE COURT: AND I DON'T HAVE ANY OBJECTION TO THIS,
10:46AM 24 OTHER THAN WHAT WE'VE SAID TODAY. THOSE MODIFICATIONS, I'LL
10:46AM 25 ACCEPT THOSE.

10:46AM 1 MS. WALSH: OKAY.

10:46AM 2 MS. VOLKAR: THAT'S CORRECT, YOUR HONOR. THE
10:46AM 3 GOVERNMENT DIDN'T OBJECT TO REARRANGING OF, I KNOW I
10:46AM 4 COLLOQUIALLY REFERRED TO THEM AS THE 3 SERIES REFERRING TO THE
10:46AM 5 MODEL INSTRUCTIONS. BUT THE GOVERNMENT DID NOT OBJECT TO THE
10:46AM 6 DEFENSE'S PROPOSED REORDERING.

10:46AM 7 WE HAD NOT YET IMPLEMENTED THE CHANGES BECAUSE WE WANTED
10:46AM 8 TO ENSURE THAT IT WAS -- THAT IT ALSO MADE SENSE TO THE COURT
10:46AM 9 AND THE COURT APPROVED THE CHANGES.

10:46AM 10 BUT IN THE NEXT ITERATION OF THE DOCUMENT, WE WILL
10:46AM 11 ACTUALLY REARRANGE THE INSTRUCTIONS THEMSELVES TO MATCH THIS
10:46AM 12 PROPOSED TABLE OF CONTENTS.

10:46AM 13 THE COURT: THAT'S GREAT. THANK YOU.

10:46AM 14 CAN I ASK YOU THAT YOU PREPARE THEM, A FINAL SET, SHARE
10:46AM 15 THAT, MAKE SURE I GET -- AND THEN YOU'LL SEND IT TO ME. BUT
10:46AM 16 WHEN YOU DO SO, IF I CAN GET AGREEMENT FROM BOTH SIDES THAT
10:46AM 17 THIS IS THE FINAL SET THAT YOU'VE REACHED AGREEMENT ON. I'LL
10:46AM 18 ASK YOU ABOUT THAT AGAIN BEFORE I READ THEM NEXT WEEK SOMETIME.

10:47AM 19 MS. WALSH: YES, YOUR HONOR.

10:47AM 20 THE COURT: AND THAT WILL BE THE PACKET THAT THE
10:47AM 21 COURT WILL GIVE.

10:47AM 22 MS. VOLKAR: YES, YOUR HONOR. TO CLARIFY, DO YOU
10:47AM 23 WANT US TO THE FILE THE JOINT PROPOSED INSTRUCTIONS AND PROVIDE
10:47AM 24 A WORD COPY?

10:47AM 25 THE COURT: YES. IF YOU HAVE AGREEMENT ON THAT SUCH

10:47AM 1 THAT YOU BELIEVE YOU CAN FILE AN AGREED UPON SET, THAT WOULD BE
10:47AM 2 FINE, AND THEN I'LL RECEIVE A COPY.

10:47AM 3 MS. WALSH: VERY GOOD, YOUR HONOR.

10:47AM 4 MS. VOLKAR: THANK YOU, YOUR HONOR.

10:47AM 5 THE COURT: ONE LAST THING I WANT TO ASK YOU TO DO,
10:47AM 6 BOTH SIDES TO DO, IS BEFORE I INSTRUCT, BEGIN INSTRUCTIONS -- I
10:47AM 7 THINK I MENTIONED THIS IN OUR PRETRIAL CONFERENCE -- BUT I DO
10:47AM 8 WANT YOU TO REVIEW EACH OF YOUR EXHIBIT LISTS TO MAKE CERTAIN
10:47AM 9 THAT EVERY EXHIBIT THAT YOU SOUGHT TO BE INTRODUCED AND THAT
10:47AM 10 YOU MOVED TO BE INTRODUCED WAS INTRODUCED.

10:47AM 11 IF THERE'S SOMETHING LACKING, BEFORE THE JURY GET THE
10:47AM 12 CASE, I WOULD LIKE TO MAKE SURE THAT YOU GET CLARITY ON THAT.

10:48AM 13 THAT TYPICALLY MEANS A MEETING WITH MS. ROBINSON TO GO
10:48AM 14 OVER YOUR LIST TO CONFIRM THE FINAL EXHIBIT LIST SO THE JURY
10:48AM 15 WILL HAVE IT.

10:48AM 16 MS. WALSH: YES, YOUR HONOR.

10:48AM 17 THE COURT: AND I'LL INVITE YOUR TEAMS TO DO THAT.

10:48AM 18 MS. VOLKAR: YES, YOUR HONOR.

10:48AM 19 MY UNDERSTANDING IS THAT OUR WONDERFUL SUPPORT STAFF HAS
10:48AM 20 STARTED THAT PROCESS, AND I -- BASED ON HEARSAY, I UNDERSTAND
10:48AM 21 THAT THERE MIGHT BE SOME MEETING ON MONDAY. BUT I WILL QUICKLY
10:48AM 22 GET OUT OVER MY SKIS ON THAT, BUT WE WILL MAKE SURE IT'S DONE.

10:48AM 23 THE COURT: THAT'S GREAT. I JUST WANT TO CONFIRM
10:48AM 24 THAT THE JURY WILL HAVE EVERYTHING ON TUESDAY AND THAT, IF WE
10:48AM 25 NEED TO AUGMENT THE RECORD, WE WILL DO THAT BEFORE THEY GET THE

10:48AM 1 CASE.

10:48AM 2 OKAY?

10:48AM 3 MS. WALSH: YES, YOUR HONOR.

10:48AM 4 MS. VOLKAR: YES, YOUR HONOR.

10:48AM 5 MS. WALSH: MR. COOPERSMITH HAS A MATTER HE WOULD
10:48AM 6 LIKE TO ADDRESS.

10:48AM 7 THE COURT: SURE. YES.

10:48AM 8 MR. COOPERSMITH: THANK YOU, YOUR HONOR. GOOD
10:48AM 9 MORNING.

10:48AM 10 I JUST WANTED TO MENTION ONE, I GUESS, LOOSE END, FOR LACK
10:48AM 11 OF A BETTER WORD, THAT WE WOULD NEED TO GET RESOLVED, NOT
10:49AM 12 NECESSARILY TODAY, BUT BEFORE WE START CLOSING ARGUMENT, AND
10:49AM 13 THAT IS THIS MOTION THAT WE MADE TO STRIKE A PORTION, A SMALL
10:49AM 14 PORTION, OF MS. BENNETT'S TESTIMONY. AND I THINK I GAVE THE
10:49AM 15 COURT THE TRANSCRIPT CITES ON THAT ONE.

10:49AM 16 I WOULD JUST NOTE ONE THING, AND THIS APPEARS AT PAGE 5132
10:49AM 17 OF THE TRANSCRIPT, AND IT'S DURING MS. BENNETT'S REDIRECT
10:49AM 18 EXAMINATION WHERE THIS CAME UP.

10:49AM 19 AND THERE'S SOME AMBIGUITY, AND THE COURT MAYBE ALREADY
10:49AM 20 LOOKED AT THIS WHEN I GAVE THE TRANSCRIPT CITE, BUT ON LINES 11
10:49AM 21 THROUGH 13 OF PAGE 5132 -- ACTUALLY, STARTING FROM LINE 9 OF
10:49AM 22 THAT PAGE, THE COURT SAID, "I DON'T THINK IT'S 702, BUT ARE YOU
10:49AM 23 OFFERING THIS FOR THE TRUTH?"

10:49AM 24 AND MR. LEACH RESPONDED, "I'M NOT OFFERING IT FOR THE
10:49AM 25 TRUTH, YOUR HONOR. I WAS ASKING HER ABOUT THE DOCUMENTS. I

10:49AM 1 THINK IT'S A -- I'M OFFERING THE STATEMENT UNDER 801(D) (2), SO"
10:50AM 2 AND THEN IT GETS CUT OFF BECAUSE UNFORTUNATELY MY COLLEAGUE
10:50AM 3 SPOKE OVER HIM.

10:50AM 4 SO I DON'T KNOW, MAYBE MR. LEACH CAN FINISH HIS SENTENCE,
10:50AM 5 BUT I DON'T KNOW, IT'S AMBIGUOUS.

10:50AM 6 IT LOOKS LIKE HE STARTED OFF SAYING IT'S NOT OFFERED FOR
10:50AM 7 THE TRUTH, BUT WHAT ENDED UP HAPPENING IS THE DOCUMENT ITSELF
10:50AM 8 THAT WAS BEING DISCUSSED, THIS PATIENT IMPACT DOCUMENT, WAS NOT
10:50AM 9 ADMITTED.

10:50AM 10 BUT THERE WAS A QUESTION ASKED, AND THAT'S THE TESTIMONY
10:50AM 11 AT PAGE 5133, LINE 21, THROUGH 5134 AT LINE 4.

10:50AM 12 AND THAT'S WHEN THE QUESTION WAS ASKED AND THE WITNESS
10:50AM 13 RESPONDED, "THERANOS SAID," MEANING THERANOS TOLD CMS, "THAT
10:50AM 14 THE LABORATORY CONCLUDED THAT THERE WAS A POSSIBLE PATIENT
10:50AM 15 IMPACT FOR EVERY TEST REPORTED FROM THE LABORATORY'S TPS 3.5
10:50AM 16 INSTRUMENT."

10:50AM 17 SO OUR VIEW OF THAT IS THAT WAS -- AND I DON'T WANT TO
10:50AM 18 REARGUE, BECAUSE WE ALREADY MADE THIS ARGUMENT, BUT THIS IS
10:50AM 19 HEARSAY. THE PURPOSE OF NOTICE TO THE AGENCY IS NOT A RELEVANT
10:51AM 20 PURPOSE.

10:51AM 21 BUT AT A MINIMUM, WE THINK THAT WAS NOT OFFERED FOR THE
10:51AM 22 TRUTH AND SHOULD NOT COME IN FOR THE TRUTH IF IT WAS, IN FACT,
10:51AM 23 NOTICE TO THE AGENCY, IF THAT WAS SOMETHING THAT THE COURT
10:51AM 24 WOULD THINK WAS EVEN RELEVANT.

10:51AM 25 SO THAT'S THE GIST OF IT. AND, AGAIN, IT'S NOT SOMETHING

10:51AM 1 THAT WE NEED TO RESOLVE RIGHT NOW, BUT BEFORE CLOSING ARGUMENT.

10:51AM 2 THE COURT: SURE. OKAY. THANK YOU.

10:51AM 3 MS. VOLKAR.

10:51AM 4 MS. VOLKAR: YOUR HONOR, MR. LEACH HANDLED THAT

10:51AM 5 BEFORE.

10:51AM 6 ONE THING I'LL SAY AS HE MAKES HIS WAY TO THE PODIUM IS MY

10:51AM 7 RECOLLECTION IS THAT THERE WAS A LENGTHY DISCUSSION BETWEEN THE

10:51AM 8 COURT AND THE PARTIES IN THE MORNING BEFORE THE PORTION THAT

10:51AM 9 MR. COOPERSMITH IS REFERRING TO, AND I BELIEVE THAT WHEN

10:51AM 10 MR. LEACH WAS ADDRESSING IT, HE WAS UNDERSTANDING THAT THE

10:51AM 11 COURT WAS ONLY GOING TO ADMIT IT FOR A LIMITED PURPOSE, EVEN

10:51AM 12 THOUGH IT'S THE GOVERNMENT'S PERSPECTIVE IT COULD BE AN

10:51AM 13 801(D) (2) STATEMENT.

10:51AM 14 BUT I'LL LET MR. LEACH TAKE IT FROM HERE.

10:51AM 15 THE COURT: THANK YOU, MR. LEACH.

10:51AM 16 MR. LEACH: I DON'T HAVE ANY FURTHER ARGUMENTS, YOUR

10:51AM 17 HONOR. WE'LL SUBMIT ON OUR PRIOR STATEMENTS.

10:51AM 18 THE COURT: ALL RIGHT. THANK YOU.

10:52AM 19 MR. COOPERSMITH: BUT AT THE TIME THE QUESTION WAS

10:52AM 20 ASKED AND IT CAME IN, THE COURT DID NOT GIVE ANY INSTRUCTION AS

10:52AM 21 TO A LIMITED PURPOSE, SO THAT'S THE ESSENCE OF THE ISSUE.

10:52AM 22 SO THANK YOU, YOUR HONOR.

10:52AM 23 THE COURT: OKAY. GOT IT.

10:52AM 24 (PAUSE IN PROCEEDINGS.)

10:52AM 25 THE COURT: THANK YOU.

10:52AM 1 MR. LEACH: THANK YOU.

10:52AM 2 THE COURT: ANYTHING FURTHER TODAY? MR. SCHENK.

10:52AM 3 MR. SCHENK: NO, YOUR HONOR.

10:52AM 4 FOR CLOSING ARGUMENT IN THE HOLMES TRIAL, THE GOVERNMENT
10:52AM 5 USED A LAPEL MICROPHONE. WE, BEFORE CLOSING, RAISED THAT WITH
10:52AM 6 THE COURT JUST TO MAKE SURE THAT THAT WAS ACCEPTABLE TO THE
10:52AM 7 COURT.

10:52AM 8 I WOULD DO THE SAME RIGHT NOW.

10:52AM 9 MY RECOLLECTION IS THAT WE REQUIRED ASSISTANCE FROM COURT
10:52AM 10 STAFF TO DO SOMETHING UNDER THIS TABLE OR -- AND I DON'T KNOW
10:52AM 11 WHAT WAS DONE, BUT I KNOW WHATEVER WAS DONE, WAS NECESSARY.

10:52AM 12 SO IF WE COULD -- IF THE COURT WOULD APPROVE THAT USE
10:53AM 13 AGAIN, AND IF WE COULD RELY ON THE ASSISTANCE OF COURT STAFF TO
10:53AM 14 MAKE THAT CHANGE, WE WOULD APPRECIATE IT.

10:53AM 15 OF COURSE, WE WOULD MAKE THE MICROPHONE AVAILABLE TO THE
10:53AM 16 DEFENSE SHOULD THEY CHOOSE TO USE IT DURING THEIR CLOSING JUST
10:53AM 17 LIKE LAST TIME.

10:53AM 18 THE COURT: THANK YOU FOR THAT HEADS UP.

10:53AM 19 I DON'T HAVE ANY OBJECTION TO THE LAPEL MIKE BEING USED,
10:53AM 20 AND WE'LL CONTACT OUR I.T. PERSON TO GO INTO THE BOX AND DO THE
10:53AM 21 MAGIC.

10:53AM 22 MR. SCHENK: THANK YOU.

10:53AM 23 MR. COOPERSMITH: THANK YOU, YOUR HONOR.

10:53AM 24 WE JOIN IN MR. SCHENK'S REQUEST, SO THANK YOU FOR THAT.

10:53AM 25 THE COURT: SURE. WOULD YOU LIKE A LAPEL MIKE?

10:53AM 1 WOULD YOU LIKE TO USE THIS MIKE AS WELL?

10:53AM 2 MR. COOPERSMITH: YES, YOUR HONOR. I THINK IT WOULD
10:53AM 3 BE VERY HELPFUL.

10:53AM 4 THE COURT: SURE.

10:53AM 5 MR. COOPERSMITH: THE OTHER SORT OF RELATED TOPIC
10:53AM 6 THAT WE WERE DISCUSSING WITH MS. ROBINSON EARLIER TODAY IS THAT
10:53AM 7 WHEN THE PODIUM WAS MOVED SO I COULD FACE THE JURY AND
10:53AM 8 MR. SCHENK COULD FACE THE JURY, IT'S HELPFUL TO BE ABLE TO
10:53AM 9 ACTUALLY SEE A SCREEN BECAUSE THERE'S A SERIES OF THINGS ON THE
10:53AM 10 SCREEN.

10:54AM 11 AND IT'S KIND OF AWKWARD TO USE THIS SCREEN RIGHT HERE IN
10:54AM 12 THE MIDDLE BECAUSE THEN YOU HAVE TO SORT OF TURN.

10:54AM 13 AND I WAS WONDERING IF THERE COULD BE A SCREEN PLACED
10:54AM 14 ON -- IF IT WAS PLACED JUST ON THE EDGE OF THE GOVERNMENT'S
10:54AM 15 TABLE, OR EVEN FLIPPING THAT ONE AROUND, I DON'T WANT TO
10:54AM 16 PRECLUDE THE GOVERNMENT FROM LOOKING AT THE PRESENTATION. BUT
10:54AM 17 SOMEHOW SO THAT IF I'M STANDING, YOU KNOW, BASICALLY WHERE
10:54AM 18 MR. SCHENK IS STANDING, BUT TURNED TOWARD THE JURY, THERE WOULD
10:54AM 19 BE A WAY TO GLANCE OVER AT THE SCREEN SO I'M NOT BLIND AS TO
10:54AM 20 WHAT IS BEING SHOWN.

10:54AM 21 THE COURT: SURE. SURE.

10:54AM 22 SO THE LECTERN WILL BE FACING THE JURY. WE'LL MOVE THE
10:54AM 23 LECTERN OUT. AND THAT ONE -- I THINK WE'LL MOVE IT OUT.

10:54AM 24 I THINK, MR. SCHENK, IN THE HOLMES CASE YOU HAD A MONITOR
10:54AM 25 AT THE CORNER OF THE TABLE THAT YOU COULD REFERENCE TO YOUR

10:54AM 1 LEFT. IS THAT SOMETHING THAT YOU CAN SHARE?

10:54AM 2 MR. SCHENK: YES, YOUR HONOR.

10:54AM 3 I WOULD PREFER NOT TO USE A LECTERN DURING THE CLOSING,

10:55AM 4 BUT, YES, THE SCREEN THAT THE GOVERNMENT -- ONE OF THE TWO

10:55AM 5 SCREENS ON THE GOVERNMENT'S TABLE TURNS SO THAT IT'S AVAILABLE

10:55AM 6 FOR THE SPEAKING, OR FOR THE ATTORNEY ADDRESSING THE JURY CAN

10:55AM 7 LOOK AT.

10:55AM 8 I WILL TURN THAT FOR THE GOVERNMENT'S CLOSING, AND I WILL

10:55AM 9 JUST LEAVE IT TURNED FOR THE DEFENSE CLOSING.

10:55AM 10 MR. COOPERSMITH: THAT WOULD WORK JUST FINE. I

10:55AM 11 WOULD APPRECIATE THAT. THANKS.

10:55AM 12 THE COURT: GREAT. THANK YOU.

10:55AM 13 BUT THE LECTERN WILL BE THERE FOR USE. IF YOU WANT TO USE

10:55AM 14 IT, OR NOT, OR WHATEVER.

10:55AM 15 DO YOU THINK THAT -- DOES EITHER SIDE HAVE ANY OTHER

10:55AM 16 AUDIO/VISUAL NEEDS THAT WE SHOULD KNOW ABOUT SO WE CAN PREPARE

10:55AM 17 ANYTHING?

10:55AM 18 MR. COOPERSMITH: NOT THAT I'M AWARE OF, YOUR HONOR.

10:55AM 19 I THINK THE DISPLAY WOULD BE, YOU KNOW, SIMILAR TO WHAT WE

10:55AM 20 HAVE SEEN DURING TRIAL WHERE OUR TECH PERSON WOULD BE DOING

10:55AM 21 THAT.

10:55AM 22 THE COURT: SURE. OKAY. GREAT.

10:55AM 23 MR. SCHENK: THANK YOU.

10:55AM 24 THE COURT: THANK YOU.

10:55AM 25 SO WE'RE NEXT TOGETHER TUESDAY NEXT, I THINK.

10:55AM 1 BUT IF, IF YOU NEED TO COME OR YOU WANT TO COME AND SEE ME
10:55AM 2 ABOUT ANY INTERVENING ISSUE, JUST SING OUT TO MS. ROBINSON AND
10:56AM 3 I'M HAPPY TO BE HERE TO MEET.

10:56AM 4 MR. COOPERSMITH: THANK YOU, YOUR HONOR.

10:56AM 5 THE ONLY OTHER THING IS THAT I UNDERSTAND THE COURT IS
10:56AM 6 BEING GRACIOUS IN SWEARING MY COLLEAGUE IN.

10:56AM 7 THE COURT: YES.

10:56AM 8 MR. COOPERSMITH: AND WHENEVER THE COURT COULD DO
10:56AM 9 THAT, THAT WOULD BE VERY HELPFUL. WE WOULD APPRECIATE THAT.

10:56AM 10 THE COURT: ALL RIGHT. THANK YOU.

10:56AM 11 MR. SCHENK: THANK YOU, YOUR HONOR.

10:56AM 12 MR. COOPERSMITH: THANK YOU, YOUR HONOR.

10:56AM 13 THE COURT: WE'RE IN RECESS.

10:56AM 14 (COURT ADJOURNED AT 10:56 A.M.)

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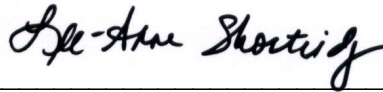
CERTIFICATE OF REPORTERS

WE, THE UNDERSIGNED OFFICIAL COURT REPORTERS OF THE
UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF
CALIFORNIA, 280 SOUTH FIRST STREET, SAN JOSE, CALIFORNIA, DO
HEREBY CERTIFY:

THAT THE FOREGOING TRANSCRIPT, CERTIFICATE INCLUSIVE, IS
A CORRECT TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE
ABOVE-ENTITLED MATTER.



IRENE RODRIGUEZ, CSR, CRR
CERTIFICATE NUMBER 8076



LEE-ANNE SHORTRIDGE, CSR, CRR
CERTIFICATE NUMBER 9595

DATED: JUNE 10, 2022